

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
American Teleservices Association, Inc.)	CG Docket No. 02-278
Petition for Declaratory Ruling on)	
Preemption of New Jersey)	
Telemarketing Rules)	

COMMENTS OF THE AMERICAN COUNCIL OF LIFE INSURERS

Pursuant to §§ 1.415 and 1.419 of the Commission’s Rules, the American Council of Life Insurers (“ACLI”) submits the following comments in support of American Teleservices Association, Inc.’s (“ATA”) Petition for Declaratory Ruling on the Preemption of the New Jersey Consumer Fraud Act and the New Jersey Telemarketing Rules (“New Jersey Rules”).¹

ACLI is the principal trade association of life insurance companies whose 383 member companies account for 73 percent of the assets of legal reserve life insurance companies, 70 percent of life insurance premiums and 77 percent of annuity considerations in the United States. ACLI members are also major participants in the pension, long-term care insurance, disability income insurance and reinsurance markets. ACLI members are actively engaged in telemarketing activities with existing and

¹ American Teleservices Association, Inc. Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code, CG Docket No. 02-278 (Aug. 24, 2004) (“ATA Petition”).

prospective policyholders, insureds and annuitants. Accordingly, ACLI members have a significant interest in the Commission's and states' rules regarding telemarketing.

ACLI shares the concerns of the ATA that the provisions of the New Jersey Rules applicable to interstate telemarketing are significantly more restrictive than the comparable provisions of the Commission's rules under the Telephone Consumer Protection Act of 1991 (the "Commission Rules").² ACLI is particularly concerned about the impact of these provisions of the New Jersey Rules on life insurers' ability to serve customers with whom they have established business relationships.

ACLI member companies believe that telemarketing laws should address consumer annoyance with unsolicited sales calls while still ensuring responsible business-customer relationships between life insurers and licensed life insurance professionals and their customers. We believe it important that telemarketing laws preserve the ability of life insurers, their affiliates, and licensed life insurance professionals to contact existing customers with whom they have established business relationships to provide information relating to existing or new financial products and services that may be of interest or benefit.

Accordingly, we urge the Commission to preempt those provisions of the New Jersey Consumer Fraud Act and the New Jersey Rules applicable to interstate telemarketing that are identified in the ATA Petition as conflicting with the Commission Rules.

² 47 C.F.R. § 64.1200 (2004).

SUMMARY

The ATA Petition identifies major areas in which the New Jersey Consumer Fraud Act and the New Jersey Rules are more restrictive than, and conflict with, the Commission Rules. The New Jersey Rules fail to include a number of the critical components of the exemption provided under the Commission Rules for telephone solicitations to consumers with whom the caller has an established business relationship (“EBR”). The exemptions provided for solicitations to “existing customers” and “established customers” under the New Jersey Rules are significantly more narrow than the exemptions provided under the EBR exception in the Commission Rules. The New Jersey Rules provide no exceptions for telemarketing calls resulting from purchases/transactions (other than for credit) or from consumer inquiries. Finally, unlike the Commission Rules, the New Jersey Rules expressly prohibit telemarketing calls to an existing customer on behalf of a seller’s affiliate.

The New Jersey Rules also conflict with the Commission Rules in that they fail to provide an exemption for telemarketing calls to consumers with whom the caller has a personal relationship. This exemption is very important to insurers because licensed insurance professionals are likely to serve many consumers with whom they have personal relationships.

ACLI believes that such conflicts with the Commission Rules could result in the New Jersey Rules being interpreted in a manner which could have a significant and adverse impact on life insurers’ ability to communicate with New Jersey consumers about products and services that could benefit them. Accordingly, the Commission should

preempt the provisions of New Jersey Consumer Fraud Act and the New Jersey Rules applicable to interstate telemarketing as requested by the ATA.

DISCUSSION

ESTABLISHED BUSINESS RELATIONSHIP

In the Commission Rules, sales calls to individuals with whom the caller has an EBR are exempt from the general prohibition on calling individuals who have registered their residential telephone numbers on the national do-not-call registry. An EBR is defined in pertinent part as follows:

...a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber ... on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.³

The New Jersey Rules provide an exception from the general prohibition on calls to individuals whose names are on the New Jersey no-telemarketing call list for calls to an "existing customer," defined as a person obligated to make payments to a seller or a person who has entered into a written contract with a seller where there is an obligation to perform by the customer, seller or both.⁴ In addition, the New Jersey Rules exempt telephone calls to: (1) an existing customer to whom the caller has extended credit if the telephone call is made within 18 months of the date of the customer's last credit transaction, or until the satisfaction of the credit obligation, whichever is later; and

³ 47 C.F.R. § 64.1200(f)(3).

⁴ N.J. Admin. Code §§ 13:45D-4.2(a)(1); 13:45D-1.3.

(2) customers who have provided their express agreement.⁵ The New Jersey Rules also exempt telemarketing sales calls to an “established customer,” provided the calls directly relate to a particular service previously provided and do not relate to expanded services, upgrades, products or other services unless directly related to the particular service previously provided.⁶ “Established customer” is defined as a customer for whom a seller has previously provided continuing services where the relationship has not been affirmatively or constructively terminated.⁷

The “existing customer” and “established customer” exceptions set forth in the New Jersey Rules are significantly more narrow than, and are in direct conflict with, the EBR exception in the Commission Rules. By providing no exemptions for calls based on purchases/transactions, other than those relating to credit, or for calls in response to inquiries from consumers, the New Jersey Rules go well beyond a mere temporal requirement related to a customer’s transaction with or inquiry to the seller, as is the case with the time periods provided in the Commission Rules.

ACLI is particularly concerned about the potential negative effect the New Jersey Rules may have on the ability of life insurers to offer consumers comprehensive insurance coverage. Telephone calls are often the most convenient and efficient way for insurers and their representatives to communicate with consumers, particularly consumers with whom they have a prior or existing business relationship. In many instances, this is the way in which consumers keep their financial representatives apprised of changes in their personal circumstances that may affect their financial needs. Telephone communications are often necessary for insurers to provide information or

⁵ N.J. Admin. Code § 13:45D-4.2(a)(2), (3).

⁶ N.J. Admin. Code § 13:45D-4.4.

⁷ N.J. Admin. Code § 13:45D-1.3.

recommendations about enhancements to existing policies or new insurance products likely to be of interest or benefit to consumers.

The New Jersey Rules appear to restrict the ability of insurers and their agents to inform consumers, particularly those who may have inadvertently allowed their policies to lapse, about enhancements or upgrades to their policies or about interesting or beneficial new products and services. We are concerned that the New Jersey Rules may not permit an insurer to contact the policyholder or insured under these circumstances because they provide only very limited exemptions for calls based on a consumer's previous purchase or transaction with the entity. The New Jersey Rules only permit calls to be made while the customer has a contract with a seller or is obligated to make payments to the seller unless: (1) the transaction was a credit transaction, in which case calls may be made for up to 18 months after the last credit transaction; or (2) the customer was an established customer receiving information about continuing services or expanded or upgraded services directly related to the particular services previously provided.

Because insurers are not creditors, under the New Jersey Rules, it appears that insurers may not make telephone calls to former customers whose policies are no longer in force. This provision is in direct conflict with the EBR exception in the Commission Rules, which recognizes the unique aspects of insurance professionals' relationships with their customers through the establishment of an 18-month period during which insurers may telephone former policyholders or insureds. Accordingly, under the Commission Rules, an insurer may call a policyholder or insured whose policy has recently lapsed to offer additional insurance products. The New Jersey Rules prohibit such contacts.

NO INQUIRY-BASED EXCEPTION

ACLI strongly agrees with ATA that the New Jersey Rules are also more restrictive than and conflict with the Commission Rules in that they fail to provide an exception for telephone calls responding to consumer inquiries. ACLI believes the EBR exception in the Commission Rules, which permits a person to call a consumer within three months of the consumer's inquiry, strikes the proper balance between responding to consumer inquiries and preventing abusive telemarketing. In the insurance industry, a consumer may have made an initial inquiry about one insurance product or annuity and be unaware that it may be beneficial to also consider another type of insurance product. The role of the insurance professional is to advise consumers of the various options. The Commission Rules permit an insurance professional to advise customers of additional products that may be of benefit to them to round out their insurance portfolios and ensure they are aware of the types of insurance coverage and annuities that are available. Again, because the New Jersey Rules restrict such calls, ACLI supports ATA's request that they be preempted.

AFFILIATE TELEMARKETING

The New Jersey Rules do not extend the established customer and existing customer exceptions to affiliates of the seller. In fact, they expressly prohibit telemarketing sales calls on behalf of a seller's affiliates to an existing customer of the seller that is on the no-telemarketing call list. This is of particular concern to the ACLI.

Because of the unique regulatory framework of the insurance industry, the corporate structures of many insurance holding companies have evolved such that different corporate affiliates often offer different types of coverage. For example, one subsidiary may issue policies for high risk customers, while another may offer policies for standard risks. One affiliate may offer life insurance and another may offer annuities; or one affiliate may offer traditional insurance products while another offers variable products. An existing customer of an insurer may very well want the type of insurance coverage or annuity offered by an affiliate. If the affiliate may not call the consumer, as is the case under the New Jersey Rules, the customer may be adversely affected by not being aware of the full range of insurance coverage available. Accordingly, we believe that the Commission should determine that the New Jersey Rules are preempted to the extent that they do not provide an exception for interstate telephone calls by affiliates, as permitted in the Commission Rules.

PERSONAL EXEMPTION

The New Jersey Rules do not provide an exemption for calls made to consumers with whom there is a personal relationship. Often an insurance agent's business is built on personal contacts. The inability to call personal contacts under the New Jersey Rules is in direct conflict with the Commission Rules. Accordingly, the Commission should determine that the New Jersey Rules are also preempted to the extent they do not contain an exception for interstate telephone calls where the caller has a personal relationship with the individual called.

CONCLUSION

For the foregoing reasons, ACLI supports the ATA Petition and urges the Commission to preempt the provisions of the New Jersey Consumer Fraud Act and the New Jersey Rules applicable to interstate telemarketing calls which are more restrictive than, and which conflict with, the Commission Rules under the Telephone Consumer Protection Act of 1991.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roberta Meyer". The signature is fluid and cursive, with the first name "Roberta" written in a larger, more prominent script than the last name "Meyer".

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